Supreme Court, U.S.
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No. 98-753

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

EXXON CHEMICAL PATENTS, INC.,

Petitioner,

vs.

THE DOW CHEMICAL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Dow's opposition, like the Federal Circuit's order of dismissal, confuses finality in the district court with finality in the administrative agency. *Richmond v. Chater*, 94 F.3d 263, 268-69 (7th Cir. 1996) (Posner, C.J.), a case which Dow elects not to address, explains why a remand order which terminates proceedings in a district court is final and hence appealable under the final judgment rule — irrespective of whether or not the remand order terminates proceedings in the administrative agency. Pet. 10-11.

QUESTION 1

Dow's opposition says that there is no conflict between the Federal Court's order of dismissal here and this Court's decision in *Forney v. Apfel*, __ U.S. __, 118 S. Ct. 1984 (1998). A side-by-side comparison of the two decisions shows that this is not so:

The Federal Circuit	*This Court*
We have held that when a trial court remands to an administrative agency for additional proceedings, the remand order is not appealable as a final order, "even though the order resolves an important legal issue." An exception to that rule exists when the remand order disposes of an important legal issue that would be effectively unreviewable at a later stage in the proceedings. (Pet. App. 3a) (citations omitted).	Nor does the [*Sullivan v. Finkelstein*, 496 U.S. 617 (1990)] opinion's reasoning permit an inference that "finality" turns on the order's importance, or the availability (or lack of availability) of an avenue for appeal from the different, later agency determination that might emerge after remand. (*Forney*, __ U.S. at __, 118 S. Ct. at 1987).

QUESTION 2

In order to defuse the conflict between the Federal Circuit and three other Circuits, Dow disavows the arguments it made, and the Federal Circuit adopted, on its motion to dismiss Exxon's appeal:

• In its opposition, Dow says, "[*S*]*ometimes* district court orders remanding a case to an administrative agency are immediately appealable, and *sometimes* they are not." Opp. 1 (emphasis added). But in the Federal Circuit, there was no "sometimes." In the Federal Circuit, Dow said categorically that Exxon's appeal to that court "is precluded by . . . [the Federal Circuit's] *bright-line rule* that district court orders remanding cases to administrative agencies are not final and therefore not appealable." Pet. 4-5 (quoting Dow's motion to dismiss, p. 1) (emphasis added).

• In its opposition, Dow says, "The Federal Circuit in no way held or suggested that the remand order in this case was *per se* unappealable because not specifically authorized by statute." Opp. 6 (emphasis in original). But in the Federal Circuit, Dow urged the *per se* rule which it now says that the Federal Circuit rejected:

> This Court [the Federal Circuit] in *Cabot* [*Corp. v. United States*, 788 F.2d 1539 (Fed. Cir. 1986),] pointed out two narrow exceptions to *the rule against hearing appeals* from a lower court order remanding a case to an administrative agency . . . .
>
> The first type of exception is the statutory exception. . . . [*T*]*here is clearly no statutory exception involved here.* (Dow's motion to dismiss, pp. 6-7) (emphasis added).

The Federal Circuit adopted Dow's argument. In granting Dow's motion to dismiss, the court endorsed Dow's bright-line/ *per se* rule. Pet. App. 4a. In granting the motion, it pointed to the absence of a specific statutory exception which, in its view, would be necessary to overcome the application of that rule here:

> Here, there is no specific statute indicating that the district court's remand order is appealable. Pet. App. 4a.

The Federal Circuit's decision is mistaken (*supra*, p. 1). It conflicts with decisions of the Third, Seventh and Tenth Circuits. Pet. 8-11.

CONCLUSION

The conflicts are real.

Dow's opposition points to two "factors" that might justify the Federal Circuit's order dismissing Exxon's appeal. Opp. 1. One (the possibility of later appellate review) has been rejected by this Court. Pet. 5-7. The other (no specific statute) has been rejected by the Third, Seventh and Tenth Circuits. Pet. 8-11.

The petition should be granted.

Respectfully submitted,

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